KESATUAN PEKERJA-PEKERJA PERUSAHAAN LOGAM

v.

K.L. GEORGE KENT (M) BHD.

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[ORIGINATING MOTION NO. R8-32-128-88]
29 AUGUST 1989

ADMINISTRATIVE LAW: *Certiorari and mandamus - Industrial Court - Jurisdictional error - Failure to consider clause 23 of Code of Conduct of Industrial Harmony - Evidence before the Industrial Court - Whether company acted reasonably.*

The respondent, on the alleged basis of redundancy, had retrenched five of its employees who were members of the applicant union. Four of the employees were trainee operators and one was a postal despatch clerk. The respondent did not offer alternate employment to the retrenched workers nor did it transfer them to other departments of the respondent. Both applicant and respondent were parties to a collective agreement.

The Industrial Court held that it was not necessary for the respondent to offer the operators' post (which were vacant) to all the claimant employees and stated that it was the duty of the employees to apply for the vacancies in the company. The complaint of the applicant was thus dismissed.

The applicant then applied for an order of *certiorari* to quash the decision of the Industrial Court and an order of *mandamus* for a fresh determination for the dispute.

Held:

[1] The Industrial Court did not consider the provisions of Article 10.1 of the collective agreement in relation to the adherence to the Code of Conduct for Industrial Harmony (the Code) which states that retrenched employees should be given priority of engagement or re-engagement as far as possible by the employer when he engages workers.

[2] The word engagement in clause 23 of the Code means engagement to any post, whereas the word re-engagement refers to engagement to a similar post from which the employee was retrenched.

[3] The view of the Industrial Court that, post retrenchment, it is the employee who should apply for a job, is an unreasonable one as only the employer would know if there exists a vacancy, it is therefore the duty of the employer to make the offer.

[4] (a) The Industrial Court had made a jurisdictional error in not considering clause 23 of the Code which both parties to the collective agreement had agreed to follow.

(b) The Industrial Court should have asked itself whether the respondent had complied with clause 23 of the Code, the evidence showed that the respondent had not done so.

(c) The Industrial Court should have asked whether in the circumstances of the case, the respondent had acted reasonably in not offering the five employees alternative employment as operators before it accepted redundancy as sufficient cause for dismissal.

[Award of Industrial Court quashed. Dispute to be determined afresh.]

Case referred to:
Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147

For the applicant - Gengadharan; M/s. Genga Maha Wong & Co.
For the respondent - Ambiga Sreenivasan; M/s. Skrine & Co.

JUDGMENT

Eusoff Chin J:

Five employees of the respondent who were members of the applicant union were retrenched by the respondent on 26 November 1986. Four of the retrenched employees who started work with the respondent between 1970 to 1980 as trainee operators were, at the time of their retrenchments either charge-hands or assistant charge hands (supervisor); and the fifth employee who started work in 1975 as a sweeper was, at the time of his retrenchment, a postal despatch clerk.

It is not disputed that the respondent under certain circumstances have the right to retrench workers, but that they have to comply with the terms of a collective agreement (agreement) signed between them and the applicant. It is also not disputed that the respondent have been employing temporary workers as operators, some for as long as 18 months which is contrary to Article 46(2) of the agreement. CW2, Chow Soo Har, who gave evidence for the employer (respondent) before the Industrial Court said that he could offer, but did not make any offer to the five retrenched employees, the jobs of operators if they were prepared to accept an operator's salary. He confirmed that the respondent did not offer alternative employment to the retrenched workers or to transfer them to other departments of the respondent. According to him the retrenchment was the result of the abolition of posts. He said that the number of permanent operators was 124 in November 1986 when the five employees were retrenched, and that in the next month (December) the respondent had recruited 13 temporary workers. The number of temporary workers at the date of hearing in the Industrial Court was 63. The number of permanent workers was not reduced but increased to 128 by January 1988.

At p. 7 and p. 8 of the award, the Chairman of the Industrial Court stated:

> It has been urged that the company could have offered the post of the operators to all the five claimants since they were at one stage of their careers in the company, operators and to support this, the Code of Conduct for Industrial Harmony is quoted, and in particular the Award No. 136/1981 is referred. There are a few English cases also cited to support such request.
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> In this case there is a collective agreement signed between the company and the union, and both parties are fully aware of the contents and conditions of such collective agreement. The first witness for the company sent a letter dated 1 August 1986, giving "advance notice of retrenchment" (Exhibit C2) and the union gave a reply dated 11 August 1986, making "proposals and suggestion to cut cost: ..." nowhere it was suggested that the five claimants should be offered the post of operators, nor the claimants making representation to the company to reduce them to the post of operators. It has been held somewhere if an employee is reduced in his post or his salary the employer is caught with a claim by the employee of a constructive dismissal unless the employee agrees to such reduction.
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> The union complains that they were temporaries, but this is permitted by the said collective agreement, in fact there is evidence before the Court that the union urged upon the company to take the temporaries as permanent workers, and this issue should not be a subject of complaint since the temporaries have been appointed since 1970, except that there are a few temporaries, who have exceeded the period of more than six months stipulated in the collective agreement.

a It was not necessary for the company to offer the operator's post to all the claimants, (although a member of the panel has suggested it) because the union had not done so, and on the other hand the company's intention was to abolish such posts.

Articles 2 and 10.1 of the collective agreement state:

2.1 This agreement shall be deemed to have come into effect on 1 April 1984 and shall b continue to remain in force until 31 March 1987 and thereafter unless superseded by a new collective agreement or award.

2.2 The provisions of this agreement have been accepted by the union and the company in full and complete settlement of all claims submitted by the union to the company regarding general terms and conditions of employment.

10.1 The union and the company agree that during the duration of this agreement or of any c renewal or extension thereof, or during the continuance of any negotiations with a view to reaching a mutually acceptable new agreement, both parties shall abide by the Code of Conduct for Industrial Harmony.

The Code of Conduct for Industrial Harmony launched by the Hon'ble Minister of Labour on 9 February 1975, is the Code of Conduct referred to by Article 10.1 of the collective agreement. Clauses 20, 21, 22(a)(ii), (b)(iii)(iv) & (v), and 23 state:

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20. In circumstances where redundancy is likely an employer should, in consultation with his employees' representatives or their trade union, as appropriate, and in consultation with the Ministry of Labour and Manpower, take positive steps to avert or minimise reductions of workforce by the adoption of appropriate measures such as:

(i) limitation of overtime work;

e (ii) restriction of overtime work;

(iii) restriction of work on weekly day of rest;

(iv) reduction in number of shifts or days worked a week;

(v) reduction in the number of hours of work;

f (vi) re-training and/or transfer to other department/work.

21. The ultimate responsibility for deciding on the size of the workforce must rest with the employer, but, before any decision on reduction is taken there should be consultation with the workers or their trade union representative on the reduction.

22 (a) If retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following measures:

g (ii) introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;

(b) The employer should select employees to be retrenched in accordance with an objective criteria. Such criteria, which should have been worked out in advance with the employees' representatives or trade union, as appropriate, may include:

h (iii) consideration for length of service and status (non-citizens, casual, temporary, permanent);

(iv) age;

(v) family situation;

23. Employees who are retrenched should be given priority of engagement/re-engagement, as far as is possible, by the employer when he engages workers.

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From the Industrial Court's award, it appears that the Industrial Court had not considered the provisions of Article 10.1 of the collective agreement which says that "during the duration of this agreement ... both parties shall abide by the Code of Conduct for Industrial Harmony", and that under clause 23 of this Code retrenched employees "should be given priority of engagement/re-engagement, as far as possible, by the employer when he engages workers."

I think the word "engagement" in clause 23 of the Code means 'engagement' to any post, whereas the word 're-engagement' would refer to engagement to a similar post from which the employee was retrenched. The evidence of CW2 shows that the company continued to engage operators and temporary operators immediately after the retrenchment exercise. Clause 23 of the Code requires the respondent to offer the posts to the retrenched employees. The Industrial Court's view is that it should be the other way round, i.e., the employees must apply. I think this is an unreasonable way of interpreting this clause 23 of the Code since only the employer would know if there exists any vacancy (permanent or otherwise), and the employer has the duty to make the offer, and if the retrenched employee refuses to accept the offer because of the lower salary or for other reasons, then the employer would be justified in offering the vacancy to a third party. A member of the Industrial Court shares this view - see p. 8 para. 2 of award. In *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 AC 147, at 171, Lord Reid said:

> It has sometimes been said it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. There are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. If it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

I find that the Industrial Court had made a jurisdictional error in not considering clause 23 of the Code of Conduct for Industrial Harmony which both parties to the collective agreement had agreed to follow. For that reason the Industrial Court came to the conclusion that "nowhere it was suggested that the 5 claimants should be offered the post of operators ..." and because of that it came to the wrong interpretation that it was the duty of the 5 claimants to apply for the vacancies in the company. The Industrial Court should have asked itself whether the company had complied with clause 23 of the Code of Conduct. The evidence before the Industrial Court shows that the company had not done so. It should have also asked whether, under the circumstances of the case, the company had acted reasonably is not offering the 5 claimants alternative employment as operators before the Industrial Court accepted redundancy as sufficient cause for dismissing the five claimants.

I therefore made the order prayed for to quash the award of the Industrial Court and direct that it should determine afresh the dispute.

Also found at [1990] 2 CLJ 401